Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 73, Original

STATE OF CALIFORNIA,

Plaintiff,

v.

STATE OF NEVADA,

Defendant.

NEVADA'S REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED ANSWER SETTING FORTH COUNTERCLAIM AND AMENDING PREVIOUS MOTION

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IN THE SUPREME COURT OF THE

UNITED STATES

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I. California Fails To Address Nevada's Assertion That The Counterclaim Is Compulsory And That Res Judicata Is Applicable.

Nevada's motion for leave to amend asserts that the counterclaim is a

compulsory counterclaim. Moreover, Nevada specifically alleges that the counterclaim must be raised in the case *sub judice* or she will be barred by the legal doctrine of *res judicata*.

Significantly, California *does not* contest the position of Nevada that the counterclaim is of a compulsory nature. Nor, does California contest Nevada's legal position that the doctrine of *res judicata* would bar raising the issues attempted to be set forth by the counterclaim in subsequent litigation. By failing to address the issues of whether the counterclaim is of a compulsory nature and the effect of the doctrine of *res judicata* upon future litigation, California should be deemed to have conceded that the counterclaim is compulsory in nature and that the doctrine of *res judicata* would bar the raising of the issues addressed therein in future litigation.

II. California's Belief That The Counterclaim Is Meritless Is Immaterial To A Decision On The Motion.

In essence, California's opposition is limited to an attack on the merits of the counterclaim. California does contend that the counterclaim raises no controversy. However, it should be sufficient to note from the length of California's opposition that it is evident a controversy does exist with respect to the issues attempted to be

raised by the counterclaim.

California urges at page 1 of her opposition that the motion to amend be denied because the issues addressed by the counterclaim are issues "which plaintiff State of California believes have no merit". If decisions to permit counterclaims and affirmative defenses are to be based on a plaintiff's belief with respect to the merits thereof, it is self-evident that few, if any, counterclaims would ever be allowed by way of amendment.

III. California Wrongly Asserts Defense Of Failure To State A Claim Which Is Normally Raised By A Motion To Dismiss Or A Reply

California states at page 7 in her opposition that count I of Nevada's proposed counterclaim relating to the oblique portion of the boundary "should not be permitted as it fails to state facts entitling Nevada to relief." This allegation of failure to state a claim for relief permeates the remainder of California's opposition. California is attempting to assert a defense normally reserved as a ground for a motion to dismiss or in a reply, that is, failure to state a claim upon which relief can be granted. The Federal Rules of Civil Procedure were enacted to simplify pleading so that only the "bare bones" need be exposed. California, however, urges the Court to look to the merits of

the counterclaim, and specifically to whether the counterclaim states a cause upon which relief can be granted, before Nevada has had an opportunity to support the counterclaim with factual evidence. California's position is contrary to the spirit and purpose of the Federal Rules of Civil Procedure, Rule 1.

IV. California Seeks To Add To Her Complaint An Issue Which She Says "Has Merit" And Yet Opposes Nevada's Proposed Counterclaim As Meritless.

Finally, it should be noted that on the same date that California filed her opposition to Nevada's Motion for Leave to File an Amended Answer Setting Forth Counterclaim, California also filed a Motion for Leave to amend her Complaint to add an additional claim for relief. Nevada does not contest California's Motion for Leave to Amend since it is Nevada's position that the Court should allow the parties to plead all legal theories of relief in the case *sub judice*. However, California apparently does not adhere to the same theory of litigation. In short, California seeks leave to amend to add what she considers an issue which "has merit" while simultaneously urging the Court to refuse to permit Nevada to set forth alternative legal theories which should be considered if the Court should determine that the "Von Schmidt" line is not the appropriate boundary. California's position

is untenable from every viewpoint.

Dated this 12th day of May, 1978.

Respectfully submitted,

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State of Nevada
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CERTIFICATE OF SERVICE

I, JAMES H. THOMPSON, Chief Deputy Attorney General of Nevada, hereby certify that on the 12th of May, 1978, I mailed by first class mail, postage prepaid, three copies to each of the following:

Edmund G. Brown, Jr.
Governor of California
State Capitol Building
Sacramento, California 95814

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James H. Thompson
Chief Deputy Attorney General

Answer

2

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ANSWER TO AMENDED COMPLAINT
AND COUNTERCLAIM

COMES NOW, the State of Nevada by and through her Attorney General, Robert List, and answers the amended complaint of the State of California in this original proceeding as follows:

I.

The State of Nevada admits Pararaph I of the amended complaint.

II.

In answer to Paragraph II of the amended complaint, the State of Nevada admits that the description of the boundary of the State of California was described in 1849 as set forth in the amended complaint. However, the

State of Nevada denies that the description of the boundary of the State of California is presently described as set forth in Paragraph II of the amended complaint. The State of Nevada further denies that Exhibit 1 is an accurate representation of the placement of the boundary described in Paragraph II of the amended complaint and demands strict proof thereof.

III.

In answer to Paragraph III of the amended complaint, the State of Nevada admits that she was admitted to this Union of United States by Act of Congress and Presidential Proclamation as stated in Paragraph III of the amended complaint. The State of Nevada further admits that the language of Article Fourteen, Section 1 of the Nevada Constitution which is quoted in Paragraph III of the amended complaint is contained in said Article Fourteen, Section 1 of the Nevada Constitution. However, the State of Nevada denies that the language quoted in Paragraph III of the amended complaint is complete and alleges that the entire description of Nevada's boundaries is as follows:

> The boundary of the State of Nevada shall be as follows: Commencing at a point formed by the intersection of the thirty eighth degree of Longitude West from Washington with the Thirty Seventh degree of North latitude; Thence due West along said thirty seventh

degree of North latitude to the eastern boundary line of the State of California; thence in a North Westerly direction along said Eastern boundary line of the State of California to the forty third degree of Longitude West from Washington; Thence North along said forty third degree of West Longitude, and said Eastern boundary line of the State of California to the forty second degree of North Latitude; Thence due East along the said forty second degree of North Latitude to a point formed by its intersection with the aforesaid thirty eighth degree of Longitude west from Washington; Thence due South down said thirty eighth degree of West Longitude to the place of beginning. And whensoever Congress shall authorize the addition to the Territory or State of Nevada of any portion of the territory on the Easterly border of the foregoing defined limits, not exceeding in extent one degree of Longitude, the same shall thereupon be embraced within, and become a part of this State. And furthermore Provided, that all such territory, lying West of and adjoining the boundary line

> herein prescribed, which the State of California may relinquish to the Territory or State of Nevada, shall thereupon be embraced within and constitute a part of this State. Nevada Constitution, Article Fourteen, Section 1.

IV.

The State of Nevada admits all portions of Paragraph IV of the amended complaint.

V.

The State of Nevada admits all portions of Paragraph V of the amended complaint and alleges that the People of California as recently as November 7, 1972, adopted the 1863 "Houghton-Ives" boundary line by amending their constitution fixing California's boundary to be as described in the 1849 Constitution except "as modified pursuant to statute."

VI.

In answer to Paragraph VI of the amended complaint, the State of Nevada admits that the "Houghton-Ives" line was adopted by the legislature of the State of Nevada in 1865 as the legal western boundary of Nevada, notwithstanding the fact that Nevada's Constitution described her western boundary along the 43rd Meridian West of Washington. The correct citation of such adoption is

Statutes of Nevada 1864-1865, Ch. 31, pp. 133-134, 379. The State of Nevada admits that said line was observed by the State of Nevada from 1865 to 1872.

VII.

In answer to Paragraph VII of the amended complaint, the State of Nevada admits that in 1872 the United States Government through its General Land Office entered into a contract with Allexey W. Von Schmidt. The State of Nevada admits that the purpose of the contract between the United States and Allexey W. Von Schmidt was to survey, post and monument the One Hundred Twentieth Meridian between the Forty Second and Thirty Ninth degrees of North latitude. The State of Nevada alleges that the survey was to begin at the point of intersection of the Forty Second degree of North latitude with the One Hundred Twentieth Meridian as established by U. S. Surveyor and Astronomer Daniel G. Major in 1868, and proceed on a true meridian south to the intersection of the Thirty Ninth degree of North latitude with the One Hundred Twentieth Meridian. The State of Nevada admits that a line known as the "Von Schmidt" line was surveyed, posted and monumented, and admits that the "Von Schmidt" line varies in location from the "Houghton-Ives" line. However, the State of Nevada denies that the variation is from 3000 to 6000 feet as alleged in Paragraph VII of the amended complaint for lack of information and

belief and demands strict proof thereof. The State of Nevada admits that since 1873 both states have exercised and continue to exercise political jurisdiction and sovereignty up to the "Von Schmidt" line as presently marked on the ground. The State of Nevada denies that the "Von Schmidt" line constitutes the lawful boundary between the states by acquiescence.

VIII.

In answer to Paragraph VIII of the amended complaint, the State of Nevada admits that a controversy exists between the States of California and Nevada as alleged in Paragraph VIII of the amended complaint. However, the State of Nevada lacks sufficient information and belief to form an answer as to the exact width of the area in dispute and therefore denies that said area is approximately 3000 feet wide at the north end of Lake Tahoe and increases to 6000 feet wide and demands strict proof thereof. The State of Nevada specifically denies that the area between the 1863 Houghton-Ives line and the 1872 Von Schmidt line is the only area in dispute. The areas in dispute as they relate to the Lake Tahoe area are shown on Exhibits "A" and "B" attached to this Amended Answer.

IX.

In answer to Paragraph IX of the amended complaint, the State of Nevada

admits that the State of California has exercised jurisdiction to the "Von Schmidt" line as presently marked on the ground since 1873. The State of Nevada denies that the State of California has now or in the past obtained dominion in the lands in question. The State of Nevada further denies she has acquiesced in California's exercise of sovereignty and jurisdiction or that California has obtained title to the land in question.

X.

The State of Nevada admits that the "Von Schmidt" line has, from time to time since 1872, been questioned in the reports of governmental agencies and that such reports have caused uncertainty and the recurring possibility of challenges to the lawfulness of such boundary line. The State of Nevada admits that Exhibit 2 does show some lines which are in contention, but shows others which are not in contention. Additionally, other lines are in contention which are not depicted. The State of Nevada admits that neither State has demanded a resurvey of the "Von Schmidt" line north of its intersection with the Thirty Ninth degree of North Latitude.

XI.

The State of Nevada does not construe Paragraph XI of the amended

complaint as requiring an answer. However, to the extent that an answer should be required, the State of Nevada denies the allegations set forth in Paragraph XI and demands strict proof thereof.

COUNTERCLAIM

COMES NOW the defendant State of Nevada and pursuant to Federal Rule of Civil Procedure 13(a), and counterclaims against the plaintiff State of California as follows:

COUNT I

CLAIM FOR HOUGHTON-B. IVES BOUNDARY

I.

The boundary line between the States of Nevada and California was established by a survey conducted pursuant to agreement of the State of California and the Territory of Nevada in 1863. Said survey was conducted by California Surveyor General J. F. Houghton and Butler Ives, the Boundary Commissioner appointed by the Territory of Nevada. The "Houghton-B. Ives" line was adopted by the California Legislature in 1864 as the Eastern boundary line of the State of California (Cal. Stats. 1864, Chap. 455, pp. 506-507, reenacted as California Government Code Section 160 in 1943 Cal. Stats. 1943, Chap. 134, p. 896). The Legislature of the State

of Nevada adopted the "Houghton-B. Ives" line as the legal Western boundary line of the State of Nevada in 1865. Statutes of Nevada 1864-1865, Chap. 31, pp. 133-134, 379.

II.

The "Houghton-B. Ives" line was surveyed pursuant to agreement of the Territory of Nevada and the State of California to set the boundary line on the One Hundred Twentieth Meridian between the Forty Second degree of North Latitude and the Thirty Ninth degree of North Latitude and southeasterly on a line between the intersection of the One Hundred Twentieth Meridian and the Thirty Ninth degree of North Latitude to the point established by Lieutenant J. C. Ives, Astronomer of the United States Boundary Commission, as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

III.

The "Houghton-B. Ives" line was surveyed and monumented between its intersection with the Thirty Ninth degree of North Latitude and its intersection with the Forty Second degree of North Latitude and for approximately one hundred miles Southeasterly on a line directed from the point of intersection with the Thirty Ninth degree of North Latitude to the intersection of the Thirty Fifth degree of North Latitude with the Colorado River as that point was established in 1861 by Lieutenant J. C. Ives, Astronomer of the United States Boundary Commission, pursuant to Act

of Congress of May 26, 1860. (See Exhibit C)

IV.

One hundred years later, in 1961, Congress gave its consent, 75 Stat. 93, to a Compact between Arizona and Nevada defining a portion of the common boundary on the Colorado River beginning at the point where the Nevada-California state line intersects the Thirty Fifth degree of North Latitude. The Arizona-Nevada boundary compact established the point of said intersection with the Thirty Fifth degree North Latitude at the Colorado River. In 1966 Congress gave its consent, 80 Stat. 340, to a Compact between Arizona and California defining their common boundary from the intersection of the boundary line common to California-Nevada and the center line of the channel in the Colorado River as constructed by the U. S. Bureau of Reclamation. The compact expressly recognizes the said point of intersection of the Thirty Fifth degree North Latitude with the Colorado River channel as being common to the boundaries of Arizona, California and Nevada. Thus, the point of intersection of the Thirty Fifth degree of North Latitude with the Colorado River was conclusively established as being the terminal point of the oblique boundary to which the Houghton-B. Ives boundary should be extended.

V.

Under the 1872 contract with the United States alleged in Paragraph VII of the Answer, Allexey W. Von Schmidt conducted

a survey of the eastern boundary of California between its intersection with the Forty Second and Thirty Ninth degrees of North Latitude and from the point of intersection of the One Hundred Twentieth Meridian and the Thirty Ninth Degree of North Latitude on a Southeasterly line to the intersection of the Thirty Fifth degree of North Latitude and the Colorado River. In conducting said survey Allexey W. Von Schmidt, who was acting as an agent of the United States Government, physically moved the boundary between the State of California and the State of Nevada Easterly along its entire length. (See Exhibit D)

VI.

The authorization by Congress of the Von Schmidt survey was in excess of the powers granted to Congress by Article One, Section 8 of the United States Constitution and therefore in violation of the Tenth Amendment to the United States Constitution in that the United States Government purported to take from the State of Nevada and add to the State of California in excess of six hundred square miles. The "Von Schmidt" survey is thus an unconstitutional survey and a nullity from its inception.

VII.

The action of the United States Government by and through its agent Allexey W. Von Schmidt in physically moving the boundary of the State of Nevada without the prior and express consent of the State of Nevada was in violation of Article Four,

Section 3 of the United States Constitution and is therefore unconstitutional.

COUNT II.

ALTERNATIVE CLAIM FOR BOUNDARY FROM MAJOR'S CORNER TO THE COLORADO RIVER

VIII.

The Counterclaimant State of Nevada alleges and incorporates Count I of the Counterclaim as though the same was fully set forth herein.

IX.

Alternatively, if the "Houghton-B. Ives" line did not establish the boundary between Nevada and California, then the boundary between Nevada and California was conclusively established when the North-eastern corner of California was set and monumented in 1868 by Daniel G. Major, U. S. Surveyor and Astronomer, under contract with the United States Government, pursuant to the Act of Congress of March 2, 1867, 14 Stat. 465, at the intersection of the One Hundred Twentieth Meridian with the Forty Second degree of North Latitude. The monument set by Major is standing intact at the present date.

X.

Upon Major's monumenting the Northeast corner of California, which is

the beginning point of California's constitutional boundary, the landmass of the States of California and Nevada with respect to their common boundary was defined and could be connected on the ground by following the description contained in the Constitution of the State of California. That is, by proceeding due South on a true meridian from the corner established by Daniel G. Major; determining where said true meridian South intersected with the Thirty Ninth degree of North Latitude; and at such point taking a line southeasterly to the point established by Lieutenant J. C. Ives at the intersection of the Thirty Fifth degree of North Latitude in the Colorado River. (See Exhibit D)

XI.

The common border of California with Nevada having thus been fixed with the establishment of Major's corner, the action of the United States Government, through its agent Allexey W. Von Schmidt, in physically moving the Northeast corner of the State of California (being also the Northwest corner of the State of Nevada) to the East and then running and monumenting the entire boundary of California and Nevada on the basis of the "new" Northeast corner of California, thereby moving the entire boundary eastward, was violative of Article Four, Section 3 of the United States Constitution and the Tenth Amendment to the United States Constitution in that by such action the United States purported to take territory of the State of Nevada and attach the same to the State of California. (See Exhibit E)

COUNT III

ALTERNATIVE CLAIM FOR THE "VON SCHMIDT" BOUNDARY IN ITS ENTIRETY

XII

Counterclaimant State of Nevada alleges and incorporates Counts I and II of the counterclaim as though the same were fully set forth herein.

XIII.

Alternatively, if neither the "Houghton-B. Ives" boundary nor the boundary established by the corner set by Daniel G. Major in 1868 constitute the boundary between the States of California and Nevada, then the boundary was first established by Allexey W. Von Schmidt in 1872-1874.

XIV.

During the period 1893-1899, the United States Government, at the request of the representatives of the State of California and following correspondence with the Governor of California, undertook a resurvey of and then physically moved the oblique portion of the "Von Schmidt" line. Said action was taken without the prior and express consent of the State of Nevada. (See Exhibit F)

XV.

The action of the United States Government in physically moving the

"oblique boundary" of Nevada and California was in violation of Article Four, Section 3 of the United States Constitution and the Tenth Amendment thereto, in that the United States Government purported to take territory of Nevada and attach the same to California.

COUNT IV

ALTERNATIVE CLAIM FOR NEW SURVEY OF THE FORTY-THIRD MERIDIAN WEST OF WASHINGTON

XVI

Counterclaimant State of Nevada alleges and incorporates Counts I, II and III of the counterclaim as though the same were fully set forth herein.

XVII

As set forth in full in Paragraph III, Article Fourteen, Section 2 of the Nevada Constitution establishes the western boundary of Nevada between the Thirty-Ninth and Forty-second degrees of North Latitude as the Forty-third meridian west of Washington. Article Fourteen, Section 1 of the Nevada Constitution, which was approved by United States Statutes at Large, Vol. 13, Ch. 36, p. 30 and Proclamation No. 22, 13 Stats. at Large, App. p. 63, also specifies that the Forty-Third meridian west of Washington is the easterly boundary of California between the Thirty-Ninth and Forty-Second degrees of North Latitude.

XVIII

Article Fourteen, Section 1 of the Nevada Constitution, as approved by Statutes at Large, Vol. 13, Ch. 26, p. 30 and Proclamation No. 22, 13 Statutes at Large, App. p. 63, constitutes the last enacted or adopted expression of the Congress and Executive of the United States and as such is controlling as to the boundary between the States of Nevada and California.

WHEREFORE, COUNTERCLAIMANT STATE OF NEVADA PRAYS AS FOLLOWS:

1. That the boundary between the State of Nevada and the State of California be declared to be the 1863 "Houghton-B. Ives" line from its intersection with the Forty Second degree of North Latitude to the intersection with the Thirty Ninth degree of North Latitude; thence along the line marked on the ground by the "Houghton-B. Ives" survey in 1863 to the terminal point thereof; thence continuing on a line to the point established by the 1961 -1966 Compacts as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

2. If the Court should determine that the 1863 "Houghton-B. Ives" line is not the legal boundary, that the boundary between the State of Nevada and the State of California be declared to be a line established by running a true Meridian South from the Northeast corner of the State of California as established by Daniel G. Major in 1868 to said true Meridian's intersection with the Thirty Ninth degree of North Latitude and thence

on a line to the point established by the 1961 - 66 Compacts as the intersection of the Thirty Fifth degree of North Latitude in the Colorado River.

3. If neither of the two lines prayed for above be determined to be the legal boundary, that the boundary between the State of Nevada and the State of California be held to be the entire "Von Schmidt" line from its beginning at the Forty Second degree of north latitude to its termination at the Colorado River; thence extending easterly to the point established by the 1961 - 66 Compacts as the intersection of the Thirty Fifth degree of North Latitude with the Colorado River.

4. If the prayers set forth in 1-3 above not be granted, then that the line presently recognized on the ground as the boundary between the States of Nevada and California be adjudged the legal boundary between California and Nevada by acquiescence.

5. If none of the prayers specified above are granted, and a new survey is ordered, that any such survey be a survey of the Forty-Third meridian of longitude west of Washington from the Forty-Necond degree of North Latitude to its intersection with the Thirty-Ninth degree North Latitude, thence southeasterly from such point of intersection to the point established by the 1961-1966 Compacts as the intersection of the Thirty-Fifth degree of North Latitude with the Colorado River.

6. For costs incurred by defendant and counterclaimant herein; and

7. For such other and further relief as the Court may deem proper.

Dated this 19 day of July, 1978.

ROBERT FRANK LIST
Attorney General of the
State of Nevada
JAMES H. THOMPSON
Chief Deputy Attorney
General
MICHAEL W. DYER
Deputy Attorney General
HARRY W. SWAINSTON
Deputy Attorney General

By _____
Robert Frank List
Attorney General of the
State of Nevada

Capitol Complex
Carson City, Nevada 89710

CERTIFICATE OF SERVICE

I, ROBERT FRANK LIST, Attorney General of Nevada, hereby certify that on the 19 day of July, 1978, I mailed by first class mail, postage prepaid, three copies to each of the following:

Edmund G. Brown, Jr.
Governor of California
State Capitol Building
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Evelle J. Younger
Attorney General of California
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Sacramento, California 95814

Robert Frank List
Attorney General of
Nevada

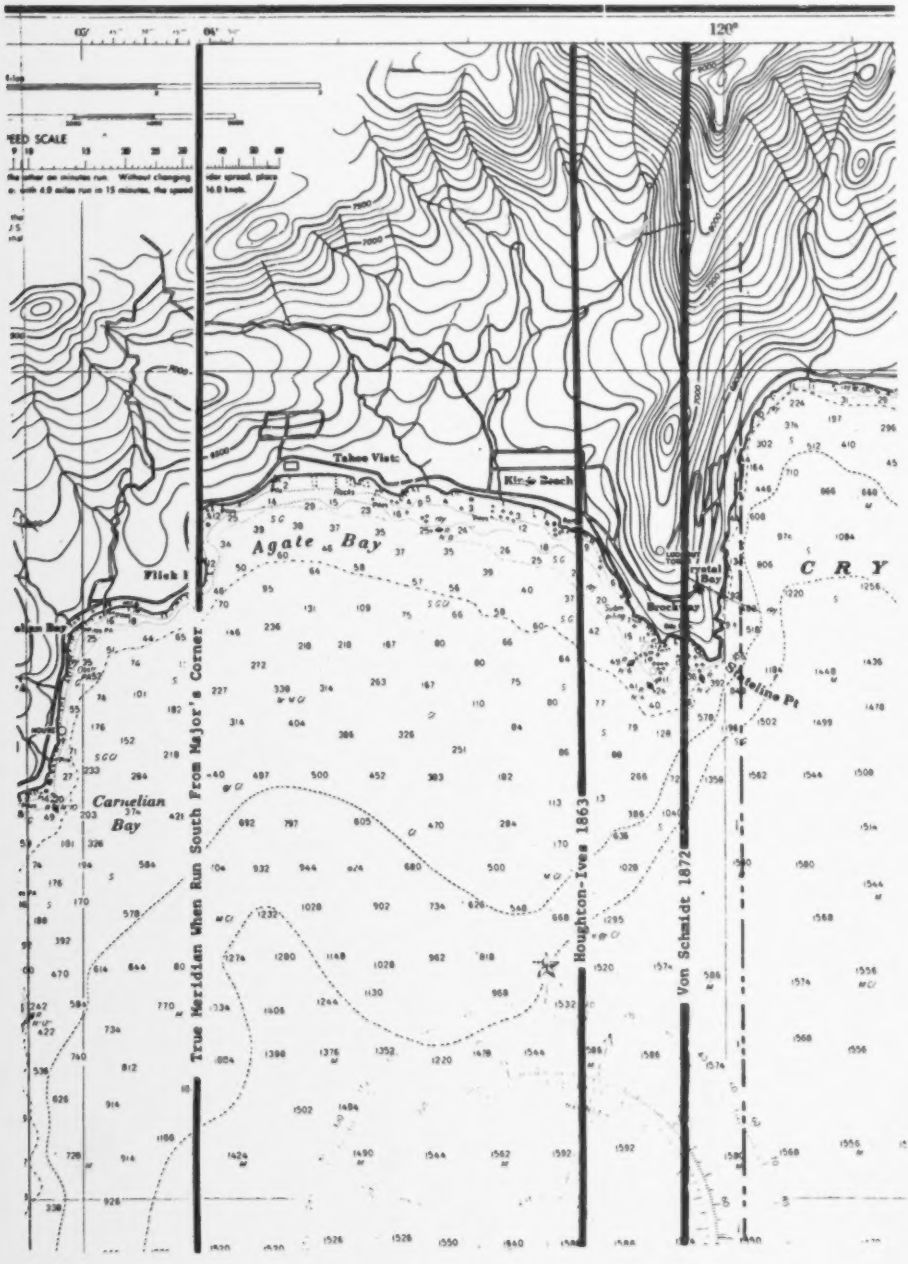

EXHIBIT "A" TO ANSWER

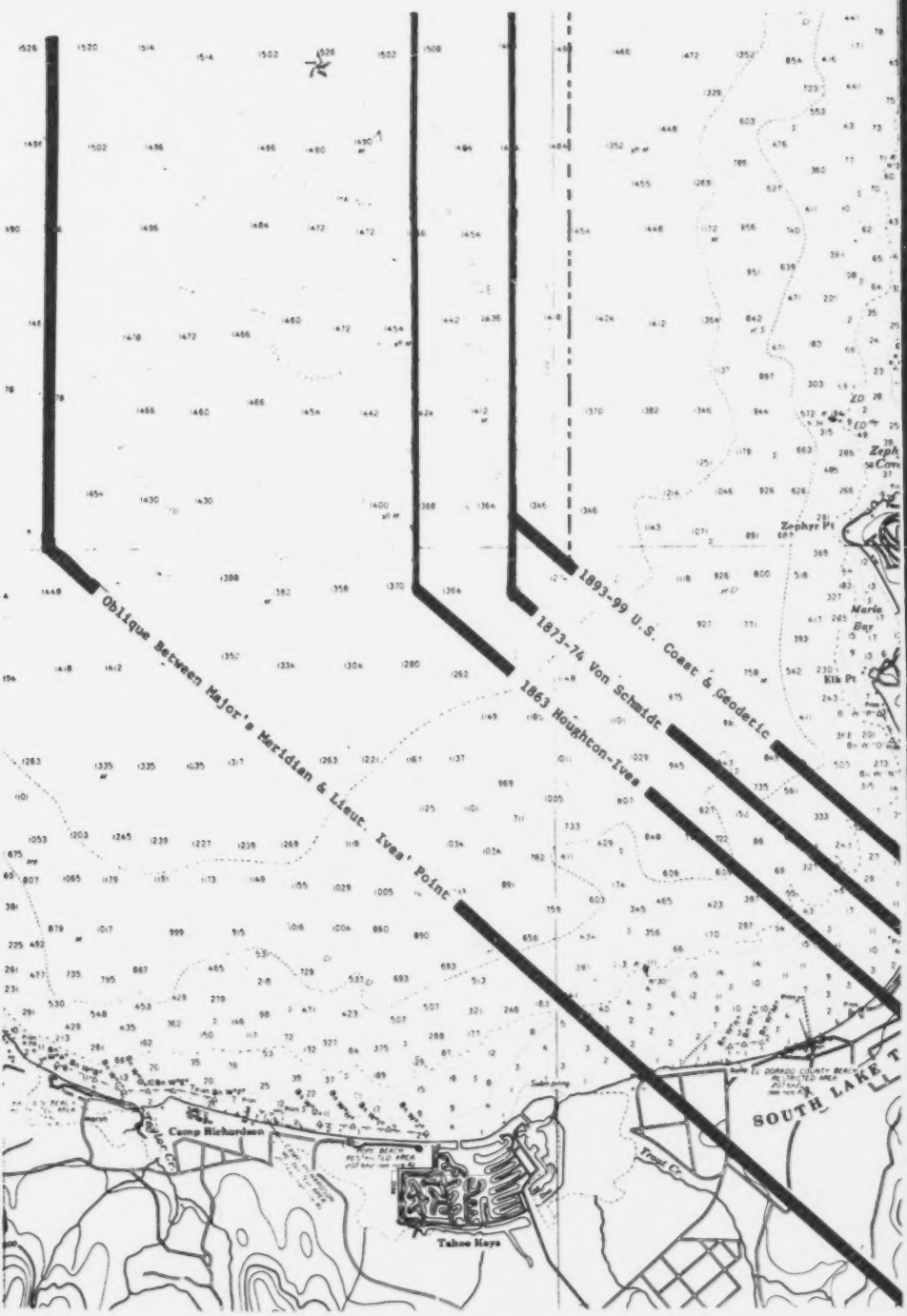

EXHIBIT "3" TO ANSWER

EXHIBIT "C" TO COUNTERCLAIM

EXHIBIT "D" TO COUNTERCLAIM

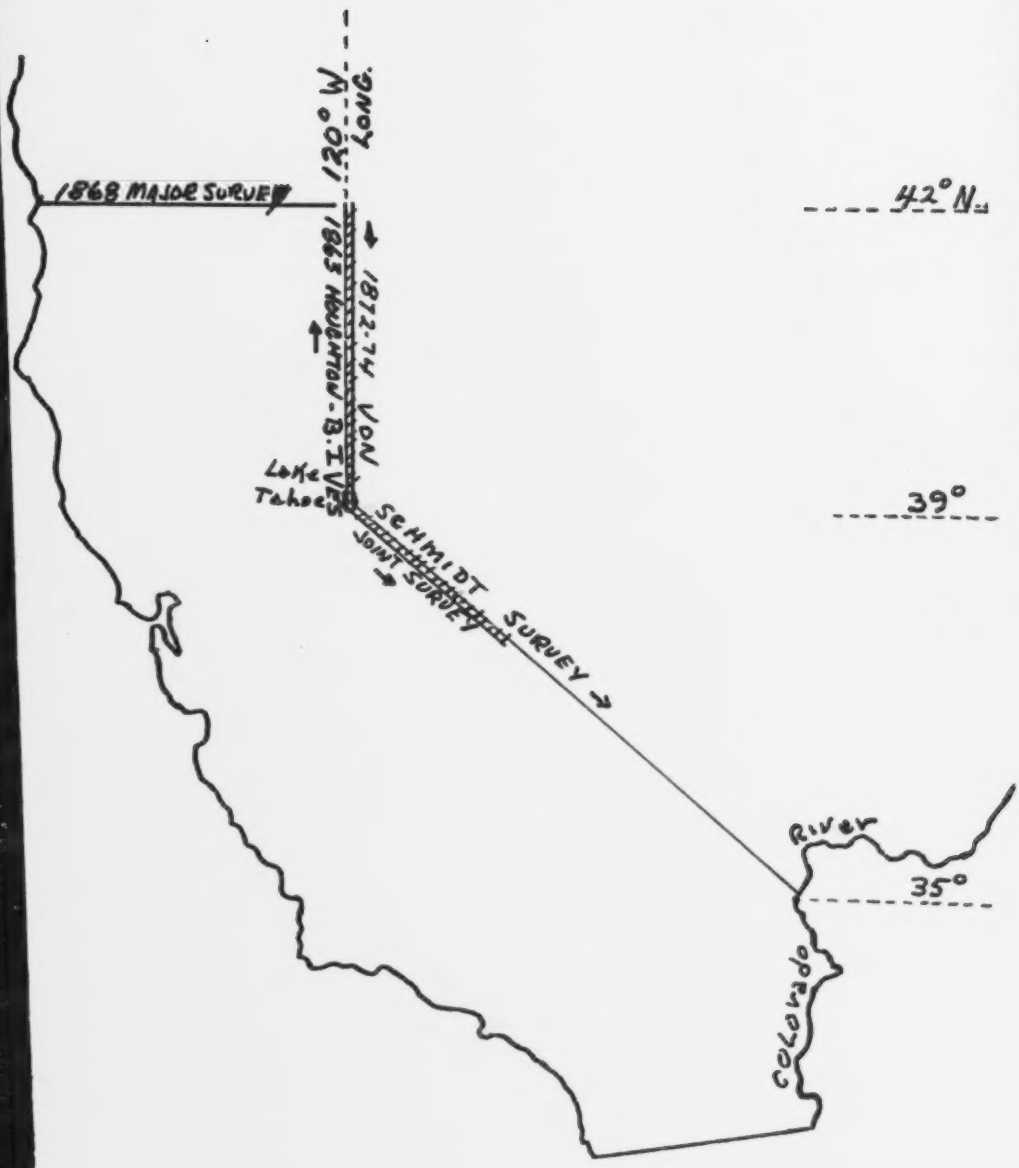

EXHIBIT "E" TO COUNTERCLAIM

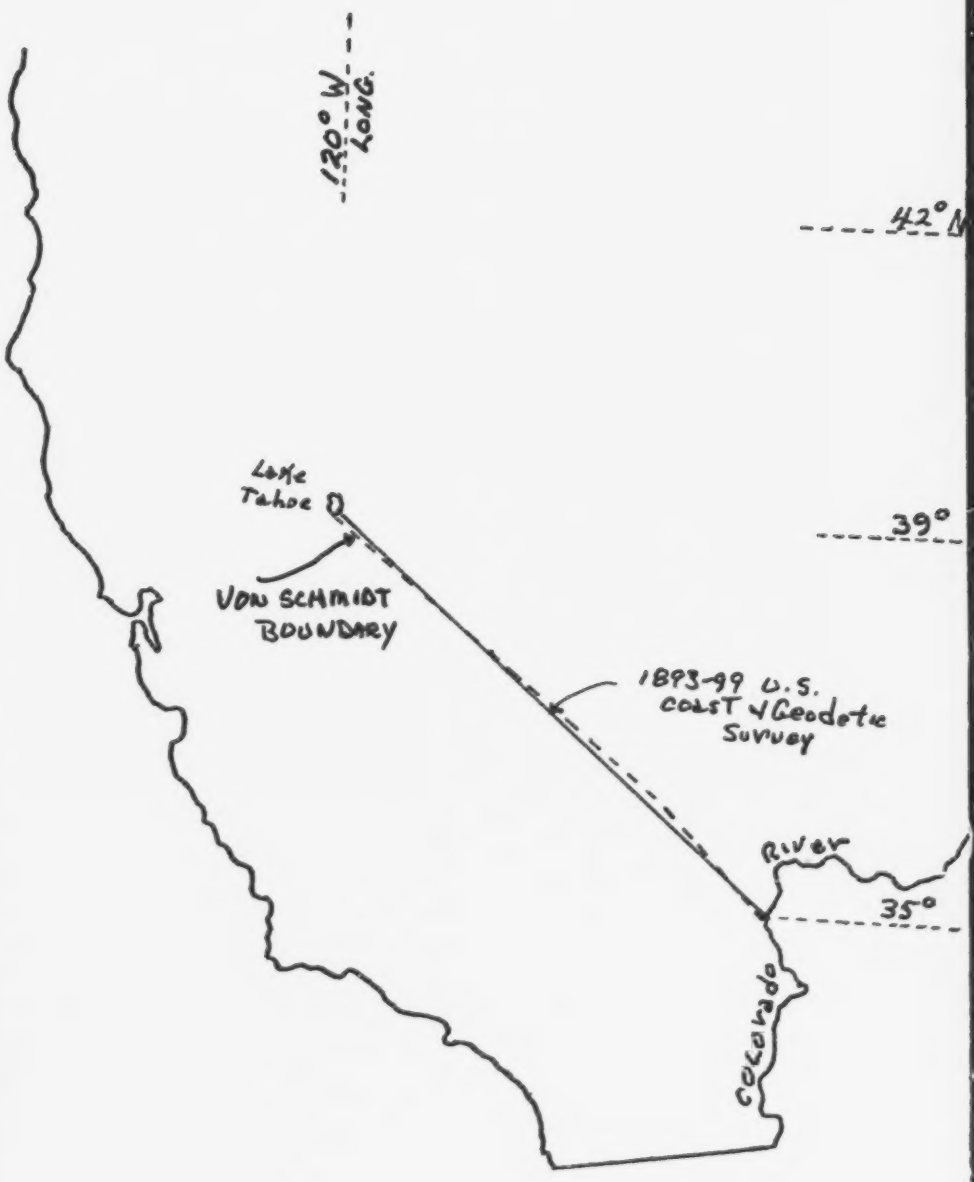

EXHIBIT "F" TO COUNTERCLAIM